No. 82-782

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In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court of appeals may, without written opinion and explanation, affirm a district court opinion which disregards the settled law of its own circuit and the overwhelming majority of other circuits on a question on which it is desirable to have national uniformity?

2. Whether a federal court of appeals may, without written opinion and explanation, affirm a district court opinion, which is at variance with the vast majority of federal courts on a question of interpretation of one of the Federal Rules of Evidence?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows: Edward J. Olsen, Jr., an Incompetent by Margaret A. Olsen, his Guardian and Margaret A. Olsen, in her own right, appellants; Ford Motor Company, a corporation, appellee; Timothy D. Cooper, additional defendant; United States of America, plaintiff-intervenor.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Citations iii

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Dawson v. Chrysler Corp., et al., 630 F. 2d 950 (1980) 7, 9

Dreisonstok v. Volkswagenwerk, 489 F. 2d 1066 (4th Cir. 1974) 5

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) 6, 7

Contents

Page

Evans v. General Motors Corp., 359 F. 2d 822 (7th Cir. 1966) 5

Hilyer v. Howat Concrete Co., 188 App. D.C. 180, 578 F. 2d 422 (1978) 10

Huddell v. Levin, 537 F. 2d 726 (3rd Cir. 1976) 5

Huff v. White Motor Corp., 565 F. 2d 104 (7th Cir. 1977) 5

Knippen v. Ford Motor Co., 546 F. 2d 993 (D.C. Cir. 1976) 5

Larsen v. General Motors Corporation, 391 F. 2d 495 (8th Cir. 1968) 4, 5, 6

N.L.R.B. v. Pittsburgh SS Co., 340 U.S. 498, 71 Sup. Ct. 453 (1951) 5, 6, 10

Nanda v. Ford Motor Co., 509 F. 2d 213 (7th Cir. 1974) 5

Olsen v. Ford Motor Co., 521 F. Supp. 59 (E.D. Pa. 1981) 2

Passwaters v. General Motors Corp., 454 F. 2d 1270 (8th Cir. 1972) 5

Perez v. Ford Motor Co., 497 F. 2d 82 (5th Cir. 1974) 5

Contents

Page

Polk v. Ford Motor Co., 529 F. 2d 259 (8th Cir. 1976) 5

Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 58 Sup. Ct. 860 (1938) 6

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 Sup. Ct. 614 (1955) 6

Seese v. Volkswagenwerk A.G., 648 F. 2d 833 (3rd Cir. 1981) 5, 6

United States v. Bowdach, 561 F. 2d 1160 (5th Cir. 1977), affirming, 414 F. Supp. 1346 (S.D. Fla. 1976), rehearing denied, 565 F. 2d 163 10

United States v. Boyd, 620 F. 2d 129 (6th Cir. 1980) 10

United States v. Iron Shell, 633 F. 2d 77 (8th Cir. 1980) 10

United States v. Napier, 518 F. 2d 316 (9th Cir. 1975)... 10

United States v. Nick, 604 F. 2d 1199 (9th Cir. 1979) ... 10

Wooten v. White Trucks, 514 F. 2d 634 (5th Cir. 1975) 5

Statutes Cited:

15 U.S.C. §1381 .....2, 7

15 U.S.C. §1901 .....2, 7

Contents

Page

28 U.S.C. §1254(1) 2

Rule Cited:

Federal Rules of Evidence, Rule 803(2) 9, 10

Other Authority Cited:

Restatement of Torts, §402(a) 6, 7

APPENDIX

Order of the United States Court of Appeals for the Third Circuit Dated July 27, 1982 ..... 1a

Order of the United States Court of Appeals for the Third Circuit Dated June 28, 1982 ..... 3a

Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, J. Bechtle Dated October 19, 1981 ..... 5a

Points for Charge 2, 3, and 4 ..... 26a

No.

In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above named petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on June 28, 1982, affirming the opinion of the United States District Court for the Eastern District of Pennsylvania, Honorable Lewis Bechtle, J., denying petitioner's motion for a new trial.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit entered a judgment order without opinion on June 28, 1982 (*see* Appendix, *infra* at 3a). The court subsequently denied petitioners' petition for rehearing on July 27, 1982 (1a). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 521 F. Supp. 59 (E.D. Pa. 1981) (5a).

JURISDICTION

As indicated immediately above, the order of the United States Court of Appeals for the Third Circuit was entered on June 28, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are 15 U.S.C. §1381 and 15 U.S.C. §1901.

STATEMENT OF THE CASE

This case is a personal injury action which was instituted in the United States District Court for the Eastern District of Pennsylvania. The jurisdiction of that court was founded upon diversity of citizenship between the parties.

The case arose from an accident which took place near the town of Hartsville, Indiana, on September 10, 1977, at which time petitioner Edward J. Olsen, Jr. was a passenger in a 1972 Ford Pinto automobile. The automobile was involved in a one vehicle accident in the early morning hours when the driver attempted to avoid an animal on the highway and rolled over several times. Petitioner Edward Olsen, age 27, suffered severe

injuries which left him permanently triplegic and virtually incompetent. The action was pursued by petitioner Margaret A. Olsen, his wife, as her husband's guardian and in her own right.

During the trial, petitioners offered into evidence portions of a deposition of the town marshal of Hartsville, taken for use at trial by respondent. The witness in question arrived at the accident scene about ten minutes after the occurrence, and was the first person not involved in the accident to come to the scene. The trial court struck from the deposition testimony of this officer that persons at the scene had told him that petitioner Edward Olsen had to be pulled from the car. Respondent strenuously contended at trial that petitioner had been ejected from the vehicle and thus was in effect not subject to the "second collision" or "crashworthiness" doctrine, which will be explained immediately below. This testimony had been offered to show that petitioner Edward Olsen had not been ejected from the car while it was rolling over and before it came to rest.

At the conclusion of the trial, the court refused petitioner's points for charge 2, 3, and 4, which are reprinted in full as an appendix to this petition (26a). These points reflected the law of several circuit courts of appeal, including the Third Circuit itself, which have approved charges which tailor products liability law specifically towards automobile accident cases in which the adequacy of the design, testing, and construction of the automobile is placed in issue. This special formulation of product liability law has been variously referred to as the "second collision" doctrine or the "crashworthiness" doctrine. "Second collision" refers to the collision of the passenger with an interior portion of the vehicle, while "crashworthiness" means decisional law which holds that a motor vehicle is more than a mere transportation container, and that it must provide reasonably safe temporary housing for its occupants.

The trial court refused the above cited requests for charge to the jury. Its charge on the design, testing, and construction of the accident vehicle was couched in the language of standard products liability. The eight-person jury rendered a verdict in favor of respondent. Petitioners filed a post verdict motion for a new trial, which was denied. An appeal was timely taken to the United States Court of Appeals for the Third Circuit in which, *inter alia*, the above points were assigned as error. The United States Court of Appeals entered a judgment order without opinion affirming the trial court, which opinion was dated June 28, 1982. Petitioners filed a petition for rehearing, which was denied in an order dated July 27, 1982.

REASONS FOR GRANTING THE WRIT

I.

In affirming without opinion the decision of the lower court, wherein the district court refused to charge on the so-called "crashworthiness" and "second collision" doctrines, the Court of Appeals for the Third Circuit in effect abandoned those doctrines for its circuit. The Third Circuit thus squarely placed itself in conflict with every other United States court of appeals which has considered the question. The seminal case was *Larson v. General Motors Corporation*, 391 F. 2d 495 (8th Cir. 1968). In *Larson*, the Eighth Circuit adopted the "second collision" and "crashworthiness" doctrines, saying, "the sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art. . . [the automobile] manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision" 391 F. 2d at 502, and "we perceive of no sound reason, either in logic or experience, nor any command in precedent, why the

manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held to a standard of reasonable care and design to provide a reasonably safe vehicle in which to travel. . . the unreasonable risk should be eliminated and reasonable steps in design taken to minimize the injury-producing effect of impact." 391 F. 2d at 503. These quotations are the essence of the second collision and crashworthiness doctrines. These principles have subsequently been adopted by every United States court of appeals to consider the issue. *Dreisonstok v. Volkswagenwerk*, 489 F. 2d 1066 (4th Cir. 1974); *Polk v. Ford Motor Co.*, 529 F. 2d 259 (8th Cir. 1976); *Huff v. White Motor Corp.*, 565 F. 2d 104 (7th Cir. 1977); *Knippen v. Ford Motor Co.*, 546 F. 2d 993 (D.C. Cir. 1976); *Nanda v. Ford Motor Co.*, 509 F. 2d 213 (7th Cir. 1974); *Passwaters v. General Motors Corp.*, 454 F. 2d 1270 (8th Cir. 1972); *Wooten v. White Trucks*, 514 F. 2d 634 (5th Cir. 1975); *Perez v. Ford Motor Co.*, 497 F. 2d 82 (5th Cir. 1974). These precepts have also been adopted by the same court of appeals to which this Court is asked to direct a writ of certiorari. *Huddell v. Levin*, 537 F. 2d 726 (3rd Cir. 1976); *Seese v. Volkswagenwerk A.G.*, 648 F. 2d 833 (3rd Cir. 1981). In *Huff*, the Seventh Circuit Court of Appeals overruled its prior case which had declined to adopt the second collision and crashworthiness principles, *Evans v. General Motors Corp.*, 359 F. 2d 822 (7th Cir. 1966). In an appendix, the Seventh Circuit noted thirty jurisdictions which followed these doctrines as of the date of the decision in 1977, and only three which did not. 565 F. 2d at 110-111.

The affirmance without opinion of the decision of the United States District Court for the Eastern District of Pennsylvania thus places the United States Court of Appeals for the Third Circuit in a conflict with the majority of other circuits, and indeed with its own prior decisions, which is both real and embarrassing. For this reason, a writ of certiorari should issue. *N.L.R.B. v.*

Pittsburgh SS Co., 340 U.S. 498, 71 Sup. Ct. 453 (1951); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 Sup. Ct. 614 (1955). Petitioners recognize that since the decision of this Court in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), writs of certiorari to resolve conflicts of United States courts of appeals in diversity cases are uncommon, since such conflicts may merely reflect differences in state law. *See, e.g., Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 58 Sup. Ct. 860 (1938). There are, however, at least two principal reasons why such considerations do not apply in the pending case, and why the issuance of a writ of certiorari to resolve the real and embarrassing conflict among circuits is appropriate. First, although the early cases such as *Larson* were decided on negligence counts, the majority of the later cases have proceeded also under the strict liability provisions of §402(a) of the Restatement of Torts. The Third Circuit Court of Appeals in *Seese* found the state of acceptance of that section in the state courts to be as follows:

> "In 1965, the *Restatement of Torts, 2d* was promulgated and from that time until the District Courts decision in this case, 45 states adopted the principle of strict liability in substantially the form described in §402(a) of the Restatement. Moreover, during that period, no State Supreme Court ever rejected the strict liability theory." 648 F. 2d at 836 (emphasis in original).

Thus, state law on the applicability of Restatement of Torts, 2d §402(a) to automobile bodies and their crashworthiness proceed from a common base, and there is therefore no reason why federal court decisions in diversity cases should reach divergent results. Where they do, as here, it is appropriate for this Court to utilize its powers of certiorari to resolve the conflict. Such a course would insure that the lower federal courts are following the mandate set down by this Court in *Erie Railroad v. Tompkins, supra*, and

are not without justification departing from state substantive law. Insuring the *Erie Railroad* is being followed promotes the true purpose of the United States district court sitting in diversity and discourages forum shopping on the part of litigants whose sole access to the federal court is on the grounds of diversity.

A second and even stronger reason supports the grant of certiorari in this case. On several occasions, the United States Congress has expressed as a matter of national policy the goal of reducing both injuries and deaths from traffic accidents and in reducing the economic loss resulting from motor vehicle damage in such accidents. *See, e.g.*, the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381, *et seq.* and the Motor Vehicle Information and Costs Savings Act, 15 U.S.C. §1901, *et seq.* As cooperative and coequal partners in the federal system of government, the federal courts have a role to play in helping to effectuate congressional policy as stated in these and other statutory enactments. It furthers these congressional policies for federal courts to announce uniform standards for automobile accident diversity cases. Of course, under *Erie Railroad v. Tompkins, supra,* due regard must be had for divergencies in underlying state law. Where, as here, however, virtually all states proceed from the same substantive base, *i.e.*, §402(a) of the 2d Restatement of Torts, there can be little if any justification for difference in standards in the federal courts. In *Dawson v. Chrysler Corp., et al.*, 630 F. 2d 950 (1980), the Third Circuit itself, speaking through Circuit Judge Adams, spoke to this point in *obiter dicta.* Citing the National Traffic and Motor Vehicle Safety Act of 1966, the court stated the following regarding automobile accident diversity cases:

> "In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile manufacturers conflicting requirements. It would be difficult for members

of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

Equally serious is the impact on other national social and economic goals of the existing case-by-case system of establishing automobile safety requirements. As we have become more dependent on foreign sources of energy, and as the price of that energy has increased, the attention of the federal government has been drawn to a search to find alternative supplies and the means of conserving energy. More recently, the domestic automobile industry has been struggling to compete with foreign manufacturers which have stressed smaller, more fuel-efficient cars. Yet, during this same period, Congress has permitted a system of regulation by ad hoc adjudications under which a jury can hold an automobile manufacturer culpable for not producing a car that is considerably heavier, and likely to have less fuel efficiency.

In sum, this appeal has brought to our attention an important conflict that implicates broad national concerns. Although it is important that society devise a proper system for compensating those injured in automobile collisions, it is not at all clear that the present arrangement of permitting individual injuries, under varying standards of

> liability, to impose this obligation on manufacturers is fair or efficient."

Yet, in affirming without opinion the decision of the United States District Court for the Eastern District of Pennsylvania in this case, the Third Circuit in effect is promoting, or at the very least is permitting, precisely that type of situation it warned against in *Dawson* — regulation by ad hoc, and frequently inconsistent, adjudication.

The goal of uniform national regulation envisioned by the Third Circuit in *Dawson* is attainable. The *Dawson* court felt that it was a problem to be addressed by the Congress, but petitioners submit that the courts, as coequal branches of the federal system, need not sit idly by awaiting action by the Congress. They can act to prevent ad hoc inconsistent regulation by jury verdict by promoting a uniformity in the charges given to juries. In the present context, that policy would be promoted by granting the writ of certiorari to the United States Court of Appeals for the Third Circuit and reversing that court's affirmance of the lower court without opinion, in the face of the overwhelming weight of the decisions in the other circuits and indeed of its own prior opinions.

II.

An additional reason exists for the granting of the writ of certiorari in the present case. Petitioners proffered certain testimony of Roger Holley, town marshal of the town of Hartsville, Indiana, concerning what persons at the scene of the accident had told him regarding the pulling of petitioner Olsen out of the vehicle. The testimony, which admittedly is traditional hearsay, was proffered under an exception to the hearsay rule which has become known as the "excited utterance" exception and which is codified in Rule 803(2), Federal Rules of Evidence. The Federal

Rules of Evidence took effect in the federal courts in July of 1975, and had as their purpose the promoting of uniformity in evidentiary rulings in the federal court system. Since that date, the other courts of appeals which have considered this exception to the hearsay rule have adopted it under circumstances similar to those which prevailed in this case. *United States v. Napier,* 518 F. 2d 316 (9th Cir. 1975); *Hilyer v. Howat Concrete Co.,* 188 App. D.C. 180, 578 F. 2d 422 (1978); *United States v. Nick,* 604 F. 2d 1199 (9th Cir. 1979); *United States v. Boyd,* 620 F. 2d 129 (6th Cir. 1980); *United States v. Iron Shell,* 633 F. 2d 77 (8th Cir. 1980); *United States v. Bowdach,* 561 F. 2d 1160 (5th Cir. 1977), *affirming,* 414 F. Supp. 1346 (S.D. Fla. 1976), *rehearing denied,* 565 F. 2d 163. The *Hilyer* case is almost exactly on point with the case at bar, involving as it did a statement given by a decedent's coworker to a policeman who arrived at the scene soon after the accident occurred.

In affirming without opinion the decision of the district court, the Third Circuit Court of Appeals in effect annuls Federal Rule of Evidence 803(2) in this circuit. It also places itself in a minority of one, in plain conflict with the other courts of appeals who have adopted the rule in like circumstances. For these reasons alone, there is such a real and embarrassing conflict of opinion and authority between the courts of appeals as to justify the issuance of a writ of certiorari by this Court. *N.L.R.B. v. Pittsburgh SS Co., supra.* In addition, a writ of certiorari to the Third Circuit Court of Appeals is in order to insure uniform application of the Federal Rules of Evidence in the lower federal courts.

CONCLUSION

For either of the above reasons independently or for both reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOSEPH D. SHEIN
MICHAEL D. SHAPIRO

SHEIN & BROOKMAN, P.A.
Attorneys for Petitioners

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 27, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-3004

OLSEN, Edward J., Jr., an Incompetent, by OLSEN, Margaret A., his guardian and OLSEN, Margaret A., in her own right,

Appellants

v.

FORD MOTOR COMPANY, a corporation,

Appellee

v.

COOPER, Timothy D.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. CIV. NO. 79-03262)

SUR PETITION FOR REHEARING

Order Dated July 27, 1982

Present: SEITZ, *Chief Judge,* ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges* and MUIR, *District Judge**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/ LEONARD GARTH
Circuit Judge

DATED: Jul 27, 1982

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* Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 28, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-3004

OLSEN, Edward J., Jr., an Incompetent, by OLSEN, Margaret A., his guardian and OLSEN, Margaret A., in her own right,

Appellants

v.

FORD MOTOR COMPANY, a corporation,

Appellee

v.

COOPER, Timothy D.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. CIV. NO. 79-03262)

Submitted Under Third Circuit Rule 12(6) on June 21, 1982

Order Dated June 28, 1982

Before: GARTH, BECKER, *Circuit Judges*, and MUIR, *District Judge**

JUDGMENT ORDER

After consideration of all the contentions raised by appellants,

Substantially for the reasons expressed in Judge Bechtle's district court opinion of October 20, 1981, 521 F. Supp. 59 (E.D. Pa. 1981), it is

ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT

s/ LEONARD GARTH
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Jun 28, 1982

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* The Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, J. BECHTLE DATED OCTOBER 19, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 79-3262
No. 80-1546

FILED OCTOBER 20, 1981
Michael E. Kunz, Clerk

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN in her own right

v.

THE UNITED STATES OF AMERICA

v.

FORD MOTOR COMPANY

BECHTLE, J. OCTOBER 19, 1981

Presently before the Court is plaintiffs' motion for a new trial in a personal injury action, brought in the name of plaintiff Edward Olsen ("Olsen"), an incompetent, by his wife as guardian, and by his wife in her own right, to recover damages from defendant Ford Motor Company ("Ford") for the injuries Olsen suffered in an automobile accident in 1977. After ten days of

trial, the jury returned a verdict in Ford's favor. After full consideration of plaintiffs' arguments, the Court has concluded that plaintiff is not entitled to a new trial. Accordingly, the plaintiffs' motion will be denied.

I. *Statement of the Case*

The accident occurred in the early morning of September 10, 1977. Olsen was seated in the front passenger seat of the car in question (a 1972 Pinto), in which he was traveling with three friends. The owner of the car, Dr. Timothy Cooper ("Cooper"), was driving. At the time of the accident, the car was traveling at about 50 to 70 miles per hour on a dry, two-lane highway. There was little traffic. An animal suddenly ran in front of the car and Cooper veered the car to the left to avoid it. He immediately turned the car back to the right to return to his lane, but upon doing so, the car "tripped" and began to roll over to the left — that is, driver's side first. The car rolled one-and-a-half times and came to rest on its roof.

Two of the three occupants, other than Olsen, suffered minor injuries; the third suffered a broken neck, from which he later recovered. Olsen was found lying on the pavement two to twelve feet outside the car on the passenger side, bleeding from the head. The accident left him triplegic and incompetent, with the mental capacity of a ten-year-old.

The roof of the Pinto was found crushed in the area of the right front (passenger's side) A-pillar, one of the two posts supporting the forward end of the roof. Plaintiffs contended that Olsen was injured when, in the course of the roll-over, the A-pillar gave way and allowed the roof to strike Olsen's head. It was plaintiffs' contention that the right front A-pillar had been

defectively and negligently designed so as to be insufficiently strong, thus rendering Ford liable on principles of either strict products liability or negligence. Plaintiffs also argued that a weld at the base of the right front A-pillar had been defectively and negligently manufactured, and gave way during the roll-over. Defendant denied that the Pinto had been improperly designed and manufactured. In addition, defendant argued that Olsen had been thrown from the car at the beginning of the roll-over process and thus could not have been injured by the Pinto's roof, even if it had been defectively or negligently designed or manufactured.

The jury delivered their verdict in answer to special interrogatories on each of the two legal theories, strict liability and negligence. The jury was first asked to state whether the Pinto had been defective and, if so, whether the defect had been the proximate cause of Olsen's injuries. Similarly, the jury was then asked whether Ford had acted negligently in the design or manufacture of the Pinto and, if so, whether Ford's negligence had been the proximate cause of Olsen's injuries. The jury found that the Pinto had not been defective and that Ford had not been negligent. Thus, the jury did not have to decide whether a defect or negligence proximately caused Olsen's injuries.

With this brief background, the Court will now address the contentions raised by the plaintiffs.

II. *Plaintiffs' Grounds for New Trial*

A. Crashworthiness/Second Collision

Plaintiffs first argue that the court failed to give the jury an adequate charge on plaintiffs' "crashworthiness" and "second collision" theories. In particular, plaintiffs state that the Court

merely gave "a straight negligence and 402A charge." In plaintiffs' view, such a charge fails to inform the jury of the applicable law.

In examining the charge for alleged error, it is necessary to view the charge as a whole. *Ely v. Reading Co.*, 424 F.2d 758, 760 (3d Cir. 1970). Moreover, "[a] party has no vested interest in any particular form of instructions; the language of the charge is for the trial court to determine. If, from the entire charge, it appears that the jury has been fairly and adequately instructed, . . . then the requirements of the law are satisfied." *James v. Continental Insurance Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970), *quoted in Shaw v. Lauritzen*, 428 F.2d 247, 251 (3d Cir. 1970).

Turning to the case at bar, we first note that any failure to charge on so-called "crashworthiness" or "second collision" principles on the 402A phase of the case cannot be asserted to be the result of the Court's failure to heed plaintiffs' objections. Before charging the jury, the Court specifically asked plaintiffs' counsel which of his points for charge were submitted on the 402A theory and which were submitted on the negligence theory. N.T. 9-61. Plaintiffs' counsel thereafter stated three times that points 1-28, which included the points at issue here, were submitted to cover the *negligence* claim, while points 29 *et seq.* were submitted to cover the strict liability claim. *See* N.T. 9-61; 9-62; 9-67 to 9-68; 9-94; 10-6 to 10-7.

Plaintiffs also appear to suggest that the "second collision" doctrine has developed into a cause of action distinguishable from negligence and strict products liability. *See* [Memorandum in Support of] Plaintiffs' Motion for a New Trial, at 7. Thus, plaintiffs seem to argue, a court cannot simply rely on principles of negligence and strict products liability where the "second

collision" doctrine is involved. Plaintiffs, however, offer no support for their argument. This is understandable because it is clear that "crashworthiness" and "second collision" are merely alternative expressions for the notion that, within limits, automobile manufacturers may be held liable for injuries caused by their failure to take the possibility of automobile accidents into consideration in designing their products. *See Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1072-1073 (E.D. Pa. 1969). As explained below, that concept is applicable to cases tried on theories of both strict products liability and negligence. It does not, however, have a life of its own as a separate and distinct cause of action.

The Court will assume, however, that plaintiffs' contention is that the Court's charge on strict products liability and negligence was inadequate because of the lack of more specific references to "crashworthiness" and "second collision." These terms are no doubt useful tools, as all words are, to guide courts, lawyers and juries in understanding more elaborate principles. Terms such as these, however, may be more attractive because of their brevity than they are useful from the viewpoint of comprehension. It is plainly preferable to concentrate on clearly explaining the relevant principles than to use shorthand expressions of uncertain or even incorrect meaning.

The so-called "crashworthiness" and "second collision" doctrines have generally come into play in personal injury actions arising out of automobile accidents in which it is alleged that the design or construction of the vehicle did not cause the accident itself, but instead caused injury in the course of an accident resulting from some other cause. *See generally* 1 *L. Frumer & M. Friedman, Products Liability* §6.05[14][a] (1981). A split of authority has developed over whether an automobile manufacturer may ever be held liable for injuries suffered in an accident where

the accident itself was not caused by a defect in the automobile. *E.g. Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966) (manufacturer could *not* be held liable). *Contra Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (manufacturer may be liable). The rationale of those cases in which the manufacturer has been absolved from liability is that a manufacturer has a duty to make a product reasonably fit for its intended purpose, and "the intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." *Evans v. General Motors Corp., supra,* at 825. The cases reaching the opposite result criticize this view as narrow and unrealistic. *E.g. Larsen v. General Motors Corp., supra,* at 502. Their view, as fully explained in the leading case taking this position, *Larsen v. General Motors Corp., supra,* is as follows:

> Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, all are foreseeable. Where the injuries

> or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.

Id. at 502 (footnote omitted).

The Pennsylvania appellate courts have not decided this issue. Two Federal Courts, however, applying Pennsylvania law, have predicted that Pennsylvania will adopt the broader view represented by *Larsen*. *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978), *aff'd*, 591 F.2d 1334, 1335 (3d Cir. 1979); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1072-1073 (E.D. Pa. 1969). There being no reason to depart from the holdings of these cases, the Court charged accordingly.

It should be plain from the language quoted above, however, that there is nothing obscure about the point that divides the authorities in these cases. In plain English, the question is whether an automobile manufacturer must take into consideration in the design and manufacture of its product the possibility that the product may be involved in an accident not of its own making. Pennsylvania law, as predicted by the Federal Courts, dictates that it must. *Jeng v. Witters, supra*, at 1355; *Dyson v. General Motors Corp., supra*, at 1072-1073. This duty is not without limits, of course, but is circumscribed by the usual principles of negligence and strict products liability. *See Larsen v. General Motors Corp., supra* (applying negligence); *Jeng v. Witters, supra* (applying principles of strict products liability); *Bowman v. General Motors*

Corp., 427 F. Supp. 234 (E.D. Pa. 1977) (same); *Dyson v. General Motors Corp., supra* (applying both negligence and strict products liability principles). The concept which principally distinguishes so-called "crashworthiness" or "second collision" cases is that the manufacturer's liability is not artificially cut off simply because the manufacturer did not intend that its product be involved in a collision. Therefore, the plaintiff suffered no prejudice as long as the charge, when considered in light of the circumstances of the case and the manner in which it was tried, instructed the jury on the principles of strict products liability and negligence in such a form that the jury would have no difficulty applying those principles even where the defect or negligence did not cause the accident itself, but caused injuries in the course of an accident resulting from other causes. Accordingly, in reviewing the charge at issue, it must necessarily be acknowledged that neither the parties nor, consequently the Court, presented the case to the jury in a way suggesting that the manufacturer could escape liability if the defect or negligence did not cause the accident itself.

Another factor which bore on the Court's decision to charge as it did is the current state of Pennsylvania products liability law. In *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), the Supreme Court of Pennsylvania held that it was improper to include the phrase "unreasonably dangerous" in a jury charge in a strict products liability case. The Court's opinion focused on the danger of improperly injecting "considerations which are usually identified with the law of negligence" into a strict liability case. 391 A.2d at 1025. *See also Holloway v. J.B. Systems Limited*, 609 F.2d 1069, 1073 (3d Cir. 1979). Plaintiffs' proposed points for charge at issue here, which quoted *Dyson v. General Motors Corp., supra*, define the manufacturer's obligation as a duty to provide passengers "a reasonably safe container within which to make the journey." Edward Olsen Points for Charge 2, Docket No. 112 (emphasis added), *quoting*

Dyson v. General Motors Corp., supra, at 1073. This definition, formulated prior to *Azzarello,* clearly cannot survive that decision for use in a charge on strict products liability.

Azzarello, however, does not prohibit the use of such a definition in a negligence case. Nevertheless, where, as here, the case is tried on theories of both strict liability and negligence, there is always the danger that, if not carefully instructed, a jury will confuse the two theories and borrow concepts from one for use in considering the other. This danger is clearly present here. The submitted points for charge state that the automobile manufacturer has an obligation to provide the passenger "a *reasonably safe container* within which to make the journey." Edward Olsen Points for Charge 2, Docket No. 112 (emphasis added), *quoting Dyson v. General Motors Corp., supra,* at 1073. At best, when used in a negligence charge, the proposed instruction explains the manufacturer's duty of care only by inference. The manufacturer's duty to exercise due care in its conduct in the design and manufacture of an automobile must be inferred from the instructions' statement that the manufacturer must provide a "reasonably safe container." Thus, the instruction attempts to explain the manufacturer's duty of care in terms of the nature of the *product* which should result, rather than in terms of the *conduct* which should be engaged in to produce it. In so focusing on the nature of the end-product rather than the character of defendant's conduct, the proposed instruction is more characteristic of a charge on strict liability than a charge on negligence. Such a charge invites the jury to borrow the charge for use in dealing with a products liability claim, thus resulting in the improper infusion of negligence principles into the jury's consideration of the strict liability claim.

Even if it is assumed, however, that a jury so instructed would succeed in confirming their use of the points at issue to their

deliberations on a negligence claim, another danger arises. For purposes of this argument, we assume that the jury so instructed would understand that the manufacturer's obligation to consider the possibility of accidents in designing and manufacturing an automobile exists under negligence principles. Plaintiffs, however, submitted no corresponding point for charge which would explain that the manufacturer must do likewise under strict liability principles. Left without guidance, the jury would be forced to guess whether or not a manufacturer would be held liable for plaintiffs' injuries where the asserted defect did not cause the accident. Any verdict would be the product of sheer speculation.[1]

Both of these criticisms give the plaintiffs the benefit of the doubt in assuming that the points for charge submitted would be valid if used in a case tried solely on a theory of negligence. Upon close examination of the charge, even this assumption proves false. It is hornbook law that negligence consists of (1) "[a] duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks," and (2) "[a] failure on his part to conform to the standard required." *W. Prosser, The Law of Torts* §30, at 143 (4th ed. 1971). In other words, negligence "is simply

---

1. The Court does not mean to suggest that plaintiffs' failure to propose adequate instructions on a particular point of law necessarily discharged the Court of any obligation to charge on that point. If the jury must be instructed on a particular point of law in order to reach a proper verdict, and that point of law has not been accurately embodied in the points for charge submitted by the parties, the Court has the duty to devise its own instructions. In this case, however, the charge given was adequate under the circumstances without the plaintiffs' proposed points for charge. Since, in addition, the plaintiffs' proposed instructions were misleading or confusing as submitted, as explained above, the Court chose to reject them entirely rather than to adopt, correct and supplement them.

one kind of conduct." *Id.* It follows that a proper charge stating for the jury the elements of *negligence* should be framed in terms of the actor's *conduct*. Further, Pennsylvania negligence law requires a manufacturer "to *exercise reasonable care in the manufacture of a chattel* which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use." *Restatement of Torts* §395 (1934), *quoted in Mannsz v. Mawhyte Co.*, 155 F.2d 445, 450 (3d Cir. 1946) (emphasis added). *See also Restatement (Second) of Torts* §395 (1965). The submitted points for charge merely define the condition of the manufacturer's product which may result if the actor — here the automobile manufacturer — conforms to the required standard of conduct: a "reasonably safe container." The points for charge say nothing, however, about the standard of care which the manufacturer must exercise in making that product. Conceivably, a manufacturer could exercise *no* care in producing an automobile and, by sheer good fortune, produce a "reasonably safe container." Since the proposed charge does not accurately define the manufacturer's duty of care, it is unfit for incorporation in a standard charge on negligence. The plaintiffs cannot complain of the Court's refusal to accept such a charge.

After reviewing the charge in light of these principles and considerations, the Court is convinced that plaintiffs are not entitled to a new trial on this ground.

B. Evidence on State of the Art

Plaintiffs' brief in support of their motion for new trial broadly alleges that the Court erred in admitting articles into evidence on the state of the art. Plaintiffs fail to specify, however,

which articles the Court erred in admitting, nor do they give references to where in the over two dozen volumes of trial and deposition transcript the errors claimed to have been made are found. In addition, plaintiffs' motion fails to cite any authority in support of its motion which might directly or indirectly assist the Court in determining the nature of the alleged errors. The Court is not obligated nor can it be expected to search through two weeks of trial transcripts to discover what could be the object of plaintiffs' motion. The requirement of Fed. R. Civ. P. 7(b) that motions "state with particularity the grounds therefor" was included to prevent the imposition of such burdens on the Court. However, to the extent the plaintiffs' objections reach matters referred to in defendant's brief, the Court will deny plaintiffs' motion for the same reasons advanced in support of its rulings at trial. *See* N.T. 6-71 to 6-75 (*re* films of roll-over tests); N.T. 7-86 to 7-87 (*re* proposed federal standard); N.T. 9-138 to 9-141 (*re* D-49). To the extent that the plaintiffs allege other errors, the motion will be denied for lack of the specificity required by Rule 7(b).

One point raised in plaintiffs' motion for new trial, but not addressed in their subsequently filed brief, deserves special mention. At trial, plaintiffs strenuously objected to the admission of evidence that, at the time the accident vehicle was built, Ford conducted tests of roof strength conforming to the procedure prescribed by a proposed Federal regulation. The regulation was later adopted. Plaintiffs relied primarily on the decision of the Supreme Court of Texas in *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), a case involving the introduction of evidence of the same proposed regulation in a crashworthiness case. In opposition, defendants relied on *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978), in which the Court held that it was error to exclude evidence of compliance with the same proposed regulation, also in a crashworthiness case. Read

closely, however, the two decisions are not inconsistent in a manner material to the case before us and, consequently, support the admission of the evidence here.

In *Turner*, the trial court allowed the manufacturer to introduce evidence that it complied with the testing procedure, but required the manufacturer to refer to it as an "industry practice" and prohibited the manufacturer from showing that the "practice" later became a Federal regulation. On appeal, the Texas intermediate appellate court reversed, in part on the ground that the manufacturer was entitled to produce such evidence for the jury's assessment. *See General Motors Corp. v. Turner*, 567 S.W.2d 812, 818-820 (Tex. Ct. Civ. App. 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979). The Supreme Court of Texas reversed again, reinstating the judgment in plaintiff's favor. 584 S.W.2d at 853. The Court did say that "[a]s a rule, post-event regulations are inadmissible." *Id.* at 852. The Court went on to say, however, that "[a] part from this, we have determined from an examination of the record that the exclusion of the subsequent federal standard was not reasonably calculated to cause and probably did not cause the rendition of an improper verdict." *Id.* The Court noted that the trial court had admitted extensive evidence of the standard's development by the industry and independent laboratories, and of its recommendation by a recognized body of automotive engineers. *Id.* at 852-853. The Court then stated that "[w]e do not believe it reasonable to conclude that the verdict of the jury would have been different had proof been allowed of the additional fact that the industry-wide practice had been subsequently adopted by federal agencies as a standard for automobile roof strength." *Id.* at 853. In short, the Court concluded that the error, if any, was harmless. The Court's efforts to explain away the omission of the standard's subsequent adoption as a Federal regulation suggest that its statement that evidence of post-event regulations

are *generally* inadmissible was not considered to be controlling in that case.

The *Stonehocker* court, however, plainly held that such evidence is admissible as relevant evidence of trade custom or usage. *See* 587 F.2d at 157. The Court agrees. If a manufacturer learns that a regulation has been proposed which, if adopted, would *require* a manufacturer to conduct a certain test on his products, and the manufacturer begins to conduct such tests before that test is required by the formal adoption of the regulation, the manufacturer's conduct certainly tends to prove that the manufacturer is exercising due care in the manufacture of his products. For example, a jury might properly infer from such evidence that the manufacturer adopted the test before it became required by regulation because those who proposed it believed the test would assist the manufacturer in determining the safety level of its product. Of course, such evidence would not be conclusive. The plaintiff might show that a reasonable manufacturer would have known the test to be inadequte and would have conducted additional tests. Nevertheless, it is relevant evidence that the jury should be allowed to consider. Thus, the Court finds no error in its admission of evidence of Ford's compliance with the proposed Federal regulation.

C. Charge on Testing

Plaintiffs' third major assignment of error in their brief in support of their motion for new trial is that the Court failed to instruct the jury that defendant had a "duty to test." *Plaintiffs' Brief* at 18. On this point, the Court charged as follows:

> The plaintiff contends that Ford Motor Company was negligent, that is, it failed to use due care under all the circumstances when it designed the roof for

> this Pinto and/or when it placed the welds in the manufacturing process. Negligence sometimes is defined as the lack of due care or lack of reasonable care under all the circumstances and the lack of care in this instance is and has been related by plaintiff to the design and the construction *including testing* of the material involved and the components involved in the design of this car.

N.T. 10-72 to 10-73 (emphasis added).

The Court obviously did not read verbatim the language proposed by plaintiffs in the points for charge. It is now, as it was throughout the trial, quite plain to the Court that the extensive evidence of the testing procedures adopted or not adopted by the defendant had been fully and forcefully presented to the jury. The Court, therefore, believed that no further instruction was needed to remind the jury of the evidence offered concerning testing or to specifically emphasize or repeatedly explain that the defendant was required to exercise due care in testing its products. Thus, plaintiffs motion for a new trial will not be granted on this ground.

D. Deposition of Roger Holley

Plaintiffs contend that it was error for the Court to exclude from the evidence a portion of the deposition of Roger Holley, the first person to arrive at the scene of the accident. The Court heard arguments of counsel on this point at the trial and rendered its reasons and its ruling at length. *See* N.T. 5-14 to 5-19. Believing that to be correct and finding no reason to elaborate on that explanation, the Court stands on that ruling here.

Memorandum and Order Dated October 19, 1981

E. Rebuttal Testimony of Mr. John Marcosky

The next contention raised by plaintiffs in support of their new trial motion is that the Court erred in excluding the rebuttal testimony of their expert witness, Mr. John Marcosky, regarding the extent of the elastic deformation of the roof. Mr. Marcosky testified in plaintiffs' case-in-chief via videotape deposition. In the course of that deposition, he made several references to "plastic" and "elastic" deformation. *See* Marcosky Deposition 15, 31-32, 177, 181, 202-204. A fair understanding of that testimony is that "plastic" deformation is the deformation which occurs during the accident and remains thereafter, while "elastic" deformation is the amount of additional deformation which occurs only during the accident but is lost thereafter when the metal springs back toward its original position. In his deposition, Mr. Marcosky could not say how much of either type of deformation had occurred in the roof of the Pinto involved in the accident. *See id.* at 202-204. Plaintiffs did not produce testimony on this point from any other witness during their case-in-chief. Thus, in defendant's case, defendant did not ask any of its expert witnesses what the amount of plastic or elastic deformation might have been in the roof of the Pinto.

In defendant's case, it advanced the theory that plaintiff was ejected from the car before its roof ever struck the pavement, and that plaintiffs, therefore, could not attribute any injuries to the Pinto's roof, whether or not defectively or negligently designed. On rebuttal, plaintiffs called only Mr. Marcosky. The Court requested an offer of proof. N.T. 9-44. The only part of plaintiffs' offer that is pertinent here was as follows: "I am going to question how much crush there was in the accident vehicle." N.T. 9-45. Also, the *only* reason declared by plaintiffs for offering the testimony was that "if a defendant has developed a theory of

ejection, we [plaintiffs] should certainly be permitted to show the site [sic] of the window." N.T. 9-48. In their brief in support of their new trial motion, plaintiffs advance this as the *exclusive* reason for offering the testimony.

The Court permitted Mr. Marcosky to testify about the measured extent of the *plastic* deformation in the Pinto's roof, but refused to permit Mr. Marcosky to testify about the extent of *elastic* deformation. As explained by the Court at trial, such testimony was beyond plaintiffs' offer of proof. More importantly, the evidence did not constitute proper rebuttal. Evidence on rebuttal is properly limited to evidence contradicting evidence offered in defendant's case-in-chief. *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 54 (5th Cir. 1963); 6 *J. Chadbourn, Wigmore on Evidence* §1873 (1976). While it is true, as plaintiffs contend, that it is not improper to admit evidence in rebuttal which also supports plaintiffs' case-in-chief, it would be improper to admit evidence in rebuttal which supports plaintiffs' case-in-chief but does not contradict evidence admitted in defendant's case-in-chief. To hold otherwise would be to permit a plaintiff to withhold part of plaintiff's case-in-chief and deprive the defendant of a fair opportunity to meet that evidence in defendant's case-in-chief. In addition, the resulting volleys of evidence back and forth between plaintiff and defendant would undoubtedly confuse even the most conscientious jury. Thus, since Ford did not offer testimony regarding the extent of "plastic" or "elastic" deformation in its case-in-chief, Mr. Marcosky's testimony was clearly improper rebuttal.

Nevertheless, even if the Court did err in refusing Mr. Marcosky's testimony, plaintiffs suffered no prejudice. Plaintiffs' sole reason for offering the testimony was to rebut defendant's theory that Olsen was ejected from the vehicle before the roof was crushed. This theory goes only to the issue of proximate cause.

Defendant argued that, even if the roof were defective, the defect did not cause Olsen's injuries because Olsen had been thrown from the vehicle before the roof deformed. The jury's answers to the special interrogatories, however, make it plain that they never reached the question of causation. Thus, whether or not Mr. Marcosky was properly prevented from offering evidence to rebut defendant's ejection theory could not have affected the result in this case.

F. Non-Joinder of Dr. Timothy Cooper

Plaintiffs also argue that the Court erred in refusing to permit counsel to join Timothy Cooper, the driver of the vehicle at the time of the accident, as a "third party defendant." To prevent confusion for any who might review the record, the Court notes at the outset that the stipulation submitted to accomplish Cooper's joinder provided that "*plaintiffs* are permitted to file a complaint against Timothy J. Cooper." Stipulation, Docket No. 130. Thus, if joined, Cooper would have been a co-defendant rather than a third party defendant. As to whether or not the Court's refusal to permit Cooper's joinder was error, the reasons for the Court's refusal clearly appear in several places in the record. *See* Transcript of Argument on Discovery (October 21, 1980), Docket No. 64, at 7-9, 16-18; Memorandum and Order, Docket No. 63 (October 28, 1980), Order, Docket No. 89 (December 8, 1980). For the same reasons, the Court believes that no error was committed. Therefore, the Court will not grant plaintiffs a new trial on this ground.

G. Punitive Damages

Plaintiffs contend that it was error for the Court to refuse to charge the jury on punitive damages. The jury, however, in

its answer to special interrogatories, found that the Pinto was not defective and that the defendant was not negligent. Since the jury found there was neither a defective product nor negligent conduct for which the defendant would have been held liable in *compensatory* damages, the jury would certainly have had no basis for imposing *punitive* damages. Thus, any error in the Court's refusal, if error there was, did not prejudice the plaintiffs.

Under Pennsylvania law, punitive damages are awarded to punish outrageous conduct. *Chambers v. Montgomery,* 411 Pa. 339, 344, 192 A.2d 355, 358 (1963). *See Restatement of Torts* §908(1) (1939). The Supreme Court of Pennsylvania has further defined "outrageous conduct" to mean " 'acts done with a bad motive or with a reckless indifference to others.' " *Chambers v. Montgomery, supra,* at 344, 192 A.2d at 358, *quoting Restatement of Torts* §908, Comment b (1939). The Supreme Court of Pennsylvania has also said that punitive damages must be based in malicious, wanton, reckless, willful, or oppressive conduct on the part of the defendant. *Chambers v. Montgomery, supra,* at 344-345, 192 A.2d at 358. Such conduct must appear affirmatively in the evidence and cannot be presumed. *Thompson v. Swank,* 317 Pa. 158, 159, 176 A. 211, 211 (1934). As explained by the Court at the time of its ruling, the defendant's mere failure to conduct a particular test in addition to or instead of those tests it admittedly conducted could not, without more, rise to the level of "outrageous" conduct. *See* N.T. 10-17 to 10-18. Nothing in the record distinguishes defendant's conduct from, at most, mere negligence. To permit the jury to consider punitive damages under the circumstances would be to allow a verdict to be based on mere speculation, prejudice or innuendo.

For both of these reasons, the Court will not grant plaintiffs' motion for new trial on this ground.

Memorandum and Order Dated October 19, 1981

H. Unanimity of the Verdict

Finally, plaintiffs contend that it was error for the Court, exercising diversity jurisdiction and applying Pennsylvania law, to charge the jury that its verdict must be unanimous. Instead, plaintiffs argue, the Court should have applied a Pennsylvania statute providing that a verdict rendered by five-sixths of the jury shall be the verdict of the jury. *See* 42 Pa. Cons. Stat. Ann. §5104 (Purdon Supp. 1981). This very argument was recently addressed and rejected by the United States Court of Appeals for the Third Circuit, which held instead that the Federal policy favoring unanimous verdicts in civil jury trials prevails even in diversity cases where the relevant state law provides for less than unanimous verdicts in civil cases. *Masino v. Outboard Marine Corp.*, 652 F.2d 330 (3d Cir. 1981). Accordingly, the Court cannot grant a new trial on this ground.

III. Conclusion

In the preceding sections, the Court has primarily addressed those contentions developed at length in plaintiffs' brief, and has found none of them to warrant granting a new trial. The Court has also reviewed the additional contentions raised in plaintiffs' motion but not developed in their brief filed four months after the filing of the motion, and has found them to be similarly without merit. Accordingly, plaintiffs' motion for new trial will be denied.

An appropriate Order will be entered.

Memorandum and Order Dated October 19, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 79-3262
No. 80-1546

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN in her own right

v.

THE UNITED STATES OF AMERICA

v.

FORD MOTOR COMPANY

O R D E R

AND NOW, TO WIT, this 19th day of October, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that plaintiffs' motion for a new trial is *denied.*

s/ L.C. Bechtle
LOUIS C. BECHTLE, J.

Filed Oct. 20, 1981
Michael E. Munz, Clerk

POINTS FOR CHARGE 2, 3 AND 4

2. You are instructed that although an automobile manufacturer has no duty to create a crash proof automobile, it does have the obligation to provide more than merely a movable platform capable of transporting passengers from one point to another. The passenger must be provided a reasonably safe container within which to make the journey. An auto manufacturer has a legal obligation to design and produce a reasonably crashworthy vehicle since a manufacturer must consider accidents as among the intended uses of its products and passengers injured in such accidents as among a group of reasonably foreseeable plaintiffs: Dyson vs. General Motors Corp., 298 F. Supp. 1064, E.D. PA; Dawson vs. Chrysler Corp., 630 F2 950, C.C.A.3.

3. You are instructed that the term crashworthiness means the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident. In considering the crashworthiness of a vehicle, you are instructed that you shall consider the term "second collision" which I define to you as the collision of the passenger with the interior part of the automobile after the initial impact or collision. The principle behind the "second collision" concept is that because of the way the vehicle has been manufactured, a passenger's injuries have been aggravated unnecessarily. Although a manufacturer is under no duty to design a car that will withstand all collisions under any and all circumstances, he must design a vehicle with a reasonably safe container and if he does not do so, he is responsible for injury and damage caused by the defective design over and above the damage or injury that probably would have occurred as a result of the accident itself absent the defective design: Jeng vs. Witters, 452 F. Supp. 1349, 1360, N.D. PA 1978.

4. Expressed in other terms, the "second collision" theory imposes liability based on construction or design of a product

Points for Charge 2, 3 and 4

which causes enhanced or greater injuries in the course of or following an initial accident or collision brought about by some independent cause: Polk vs. Ford Motor Corp., 529 F. 2nd 259, 260, C.C.A.8.

82-782

No.

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In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury on strict liability and negligence in a crashworthiness product liability case.

2. Whether the trial court abused its discretion in excluding unreliable hearsay testimony.

PARTIES

The caption to the case contains the names of all parties to the proceedings in the Court of Appeals for the Third Circuit whose judgment is sought to be reviewed.

In response to United States Supreme Court Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly-owned subsidiaries and affiliates are listed in the Appendix, *supra*.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Table of Citations iii

Statement of the Case 1

Summary of Argument 3

Reasons for Denying the Writ:

I. The trial court fairly submitted petitioners' crashworthiness claims to the jury. That the trial judge used different words than those desired by petitioners' attorney does not raise a federal question. 3

II. The trial court properly exercised its discretion in excluding unreliable hearsay testimony. 5

Conclusion 6

TABLE OF CITATIONS

Cases Cited:

United States v. McLennon, 563 F. 2d 943 (9th Cir. 1977) 5

Contents

Page

United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977) 5

Rules Cited:

Federal Rule of Evidence 803(2) 5

U.S. Sup. Ct. Rule 28.1 ii

Other Authority Cited:

Hoenig, Resolution of "Crashworthiness" Design Claims, 55 St. John's L. Rev. 633 (1981) 3

APPENDIX

Appendix 1a

No.

In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent, by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This product liability action arises out of an incident that occurred on September 10, 1977. Petitioner Edward Olsen was a passenger in a 1972 Ford Pinto driven by Timothy Cooper. Also in the vehicle were Kurt J. Hassenstein and Dwight E. Keslov.

At about 4:00 a.m. Cooper swerved to avoid a small animal and lost control of the vehicle. The vehicle rolled over 1½ times, coming to rest on its roof. After the accident, Mr. Olsen was found unconscious and seriously injured outside of the vehicle.

Petitioners never claimed that any defect in the vehicle, or any negligence on the part of Ford Motor Company, caused Mr. Cooper to lose control of the vehicle, or caused the vehicle to begin to roll over. Rather, the petitioners' theory was that Ford was negligent, and the vehicle was defective, because it was not "crashworthy." Specifically, petitioners claimed the vehicle was defective and uncrashworthy in two respects. First, petitioners claimed the roof support structure was not strong enough. Second, petitioners claimed that two spot welds in the right A pillar (the post between the passenger side door window and the windshield) failed during the rollover. As a result of one or both of these defects, petitioners claimed, the roof of the vehicle deformed and crushed Mr. Olsen's head between the roof and the passenger seat. Respondent Ford Motor Company denied the vehicle was defective in any respect, and further contended that Mr. Olsen's injuries occurred when he was ejected from the vehicle.

The case was tried in the United States District Court for the Eastern District of Pennsylvania. The basis for federal jurisdiction was diversity of citizenship. After a ten-day trial, during which petitioners' crashworthiness theories were fully explored, the case was submitted to the jury on theories of strict liability and negligence. The jury returned a verdict in favor of Ford.

Petitioners' post-trial motions were denied by the trial judge in a comprehensive written opinion, which is attached to the petitioners' petition for writ of certiorari and reported at 521 F. Supp. 59. The United States Court of Appeals for the Third Circuit affirmed, substantially for the reasons given by the trial judge

in his opinion. Petitioners' petition for rehearing was denied, and their petition to this Court followed.

SUMMARY OF ARGUMENT

No substantial federal questions are raised by the petitioners' petition. The manner in which "crashworthiness" principles are explained to the jury is clearly a question of state law, and the trial court properly exercised its discretion in excluding unreliable hearsay testimony.

REASONS FOR DENYING THE WRIT

I.

The trial court fairly submitted petitioners' crashworthiness claims to the jury. That the trial judge used different words than those desired by petitioners' attorney does not raise a federal question.

It is true, as petitioners contend, that most courts have held that a manufacturer has a duty to design and manufacture a "crashworthy" vehicle, and that the manufacturer cannot escape liability simply because it was not responsible for causing the accident itself. Petitioners contend in their petition that the trial court and the Court of Appeals abandoned this "crashworthiness doctrine",* thus creating a "conflict with every other United States

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* Petitioners' petition uses the term "crashworthiness" and "second collision." The two terms are generally used interchangeably. *See generally,* Hoenig, *Resolution of "Crashworthiness" Design Claims,* 55 St. John's L. Rev. 633 n.1, 634 n.2 (1981). The term "second collision" usually refers to the impact between a passenger and an interior part of the vehicle following the initial impact. *Id.*

Court of Appeals which has considered the question." This is nonsense. The entire case revolved around crashworthiness principles. As the trial judge observed in his opinion, "Neither the parties nor, consequently, the court, presented the case to the jury in a way suggesting the manufacturer could escape liability if the defect or negligence did not cause the accident itself." On the contrary, the trial judge specifically instructed the jury that petitioners *could* recover if their crashworthiness claims were established by the evidence:

> "If you find a defect in either or both of those elements, the roof or the welds, and you further conclude that they were a proximate cause of his injury, he is entitled to recover from Ford Motor Company for any injuries so caused."

Thus, the "conflict" which petitioners attempt to create simply does not exist. The duty to design and manufacture a crashworthy vehicle has never been disputed in this case.

Petitioners' real complaint apparently concerns the words chosen by the trial court to explain crashworthiness standards to the jury. The trial judge's reasons for instructing the jury as he did are fully explained in his opinion, which is attached to the petitioners' petition. For now, it is sufficient to note that petitioners' argument that national uniformity is required in crashworthiness cases is little more than a thinly disguised request for this Court to promulgate standard jury instructions for use nationally. The inappropriateness of this request in a diversity case is obvious.

II.

The trial court properly exercised its discretion in excluding unreliable hearsay testimony.

Petitioners' second point concerns the exclusion of hearsay testimony from Marshal Roger F. Holley. Trial courts, of course, are vested with wide discretion in the admission or exclusion of evidence. There is nothing in the record of this case to suggest abuse of that discretion, and certainly nothing that would warrant this Court's attention.

Marshal Holley arrived at the scene of the accident 10 minutes after he received a call from the sheriff's department. There is no evidence concerning how long after the fact the sheriff's department was informed of the accident. In any event, shortly after Marshal Holley arrived on the scene, someone told him that "the one that was hurt seriously was pulled from the car." Petitioners offered this portion of Marshal Holley's deposition as evidence that Mr. Olsen was not ejected from the car as Ford claimed.

Marshal Holley's vague testimony concerning what was said to him by some unidentified person was properly excluded by the court. First, the petitioners' failed to establish any foundation for their claim that this hearsay testimony was admissible under Federal Rule of Evidence 803(2). To be admissible as an excited utterance under that Rule, the statement must be made while the declarant was under the stress of excitement caused by the event or condition. *United States v. McLennon,* 563 F. 2d 943 (9th Cir. 1977); *United States v. Narciso,* 446 F. Supp. 252 (E.D. Mich. 1977). There is no evidence that the unidentified declarant who spoke to Marshal Holley was under the stress of excitement.

Moreover, Marshal Holley's deposition testimony lacked any semblance of reliability. It was undisputed at trial that two persons were seriously injured in the accident, Mr. Olsen and Mr. Keslov. Keslov *was* pulled from the vehicle by Hassenstein. Thus, the statement made to Marshal Holley could have referred equally well to the fact that Hassenstein pulled Keslov from the vehicle. The most reliable testimony on the issue was that of Cooper and Hassenstein, both of whom testified that they did not remove Olsen from the vehicle. The reliability of hearsay testimony which vaguely (if at all) suggests the contrary is clearly suspect.

None of the cases cited by the petitioners involved considerations even remotely similar to these. The exclusion of Marshal Holley's testimony under the circumstances involved in this case was clearly well within the trial judge's discretion.

CONCLUSION

The petitioners in this case are asking this Court to promulgate national standards for resolving product liability crashworthiness claims, and to secondguess the sound exercise of the trial judge's discretion on an evidentiary matter. The petition for writ of certiorari should be denied.

Respectfully submitted,

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JOSEPH V. PINTO
PETER SAMSON

WHITE & WILLIAMS
Attorneys for Respondent

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1).

The principal affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

Ford Motor Company (Belgium) N.V.;
Ford Motor Company of Canada Ltd.;
Ford Motor Company A/S (Denmark);
O Y Ford A D (Finland);
Ford-Werke Aktiengesellschaft (Germany);
Ford Nederland N.V. (Holland);
Hokkai Ford Tractor Co. Ltd. (Japan);
Ford Motor Company Sktiebolag (Sweden);
Ford Lio Ho Motor Company Ltd. (Taiwan);
Ford Glass Limited (Canada);
Ford Motor Company of Malaysia SDN. BHD.

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of October 31, 1982, and is the most current listing available:

Banner Ford, Inc.	Decatur, Ga.
Bob Beard Ford	Augusta, Ga.
Coastal Ford	Mobile, Al.
Deland Ford/Merc.	Deland, Fl.
Family Ford Sales	Spartanburg, S.C.
Freeway Ford	Columbus, Ga.
Heritage Ford/LM	Cookeville, Tenn.
Billy Howell Ford	Cumming, Ga.
Rick Hunt Ford	Warrenton, Va.

Appendix

King's Colonial Ford	Brunswick, Ga.
King's Crown Ford	Jacksonville, Fl.
Bo Lovein Ford	Nashville, Ga.
Lynchburg Ford	Lynchburg, Va.
Miracle Ford	Gallatin, Tenn.
Marshall Mize Ford	Chattanooga, Tenn.
Mountain View Ford	Chattanooga, Tenn.
Nelson Ford	DeFuniak Springs, Fl.
Old South Ford	Lexington, N.C.
Ed Sherling Ford	Enterprise, Al.
Spalding Ford/LM	Griffin, Ga.
Springfield Ford/LM	Springfield, Tenn.
Wayne Blackwood LM	Rome, Ga.
Sam Johnson LM	Charlotte, N.C.
Riverside LM	Madison, Tenn.
Rowan LM	Winter Haven, Fl.
Southern LM	Decatur, Ga.
Atlantic Ford-Merc	Saco, Me.
Chemung Ford	Elmira, N.Y.
Hammonasset Ford/LM	Madison, Ct.
Roger Karns Ford	Oneonta, N.Y.
Stan Martin Ford	Hudson, N.Y.
Metro Ford Sales	Schenectady, N.Y.
Millinocket Ford-Merc	Millinocket, Me.
Roberts Motor Sales	Attleboro, Ma.
Shiretown Ford	Plymouth, Ma.
Bob Thomas Ford	Hamden, Ct.
Bay State LM	Framingham, Ma.
Merrimack LM	Methuen, Ma.
Norman LM	Westbrook, Me.
Pride LM	Lynn, Ma.
Sentry LM	Medford, Ma.
Springfield LM	Springfield, Ma.

Appendix

Atchley Ford	Omaha, Ne.
Ben-Hur Ford Sales	Sioux Falls, S.D.
Borchers Ford/LM	Rhinelander, Wi.
Century Ford Sales	Arlington Hts., Il.
Don Courtney FM	Sandwish, Il.
Family Ford Sales	West Chicago, Il.
Fox Valley Ford	Aurora, Il.
Dee Harrison Ford	Manmouth, Il.
Highland Park Ford	Highland Park, Il.
Karp's Ford Sales	Houghton, Mi.
Al Piemonte Ford Sales	Melrose Park, Il.
Rock River Ford	Rockford, Il.
Romeo Ford	Romeville, Il.
Southgate Ford	Milwaukee, Wi.
Suburban Ford, Inc.	Elgin, Il.
Toten-Evert Ford/LM	Marquette, Mi.
Willowbrook Ford	Willowbrook, Il.
Barrington Sales	Barrington, Il.
Bell LM Sales	Highland Park, Il.
Berens LM	Chicago, Il.
Capitol LM	Chicago Hts., Il.
Joe Carini LM Sales	Saukesha, Wi.
Libertyville LM	Libertyville, Il.
Lombard LM	Lombard, Il.
River Oaks LM	Calumet City, Il.
Carriage Ford	Clarksville, In.
Country Ford	Belle Vernon, Pa.
Fuller Ford	Cincinnati, Oh.
Hundley Ford	Providence, Ky.
Interstate Ford	Miamisburg, Oh.
Landmark Ford Sales	Hamilton, Oh.
Bill McCoy Ford	Muncie, In.
Parkview Ford	Middletown, Oh.

Appendix

Parkway Ford	Madisonville, Ky.
Ramsey-Sturman Ford	Pittsburgh, Pa.
Dick Ruhl Ford Sales	Columbus, Oh.
Shoemaker-Finch Ford	Springfield, Oh.
Target Ford	Monroeville, Pa.
Ernest White Ford	Delaware, Oh.
Whitewater Ford/LM	Connersville, In.
Woltz & Wind	Heidelberg, Pa.
Astley LM	Chillicothe, Oh.
Columbia LM	Indianapolis, In.
Jim Dixon LM	Fairfield, Oh.
Fort Wayne, LM	Fort Wayne, In.
Metropolitan LM	Louisville, Ky.
North LM	Indianapolis, In.
Taylor Sales	Cincinnati, Oh.
Blue Springs Ford	Blue Springs, Mo.
Champion Motor Sales	Dallas, Tx.
Indian Springs Ford	Kansas City, Ks.
Interstate Ford Sales	St. Joseph, Mo.
Middlekauff Ford	Dallas, Tx.
North Central Sales	Richardson, Tx.
One Moore Ford	No. Little Rock, Ar.
Ron Roberts Ford	Wichita Falls, Tx.
Gus Shaffar Ford	Joplin, Mo.
Starkville Ford/Merc.	Starkville, Ms.
Stuard Ford	Ferriday, La.
Vantage Ford/LM	ElDorado, Ks.
Westway Motor Sales	Irving, Tx.
Bob Higgins LM	Texas City, Tx.
North Hills LM	Hurst, Tx.
Northtowne LM	Kansas City, Mo.
Adrian Ford/LM	Adrian, Mi.
All American Ford	Saginaw, Mi.
Alpena Ford/LM	Alpena, Mi.

Appendix

Battle Creek Ford	Battle Creek, Mi.
Al Bennett Ford	Flint, Mi.
Dock Boyd Ford	Ludington, Mi.
Candy Ford/Merc	Charlotte, Mi.
Mel Farr Ford	Oak Park, Mi.
Friendly Ford	Monroe, Mi.
Greenville Ford/LM	Greenville, Mi.
Tom Holzer Ford	Farmington, Mi.
Montrose Ford	Akron, Oh.
Niles Ford/LM	Niles, Mi.
Renaissance Ford	Detroit, Mi.
Tom Sheridan Ford	Bryan, Oh.
University Ford	Bowling Green, Oh.
Varsity Ford	Ann Arbor, Mi.
Village Ford	Dearborn, Mi.
Lima LM	Lima, Oh.
Stadium LM	Youngstown, Oh.
Avalon Ford	Carson, Ca.
Mel Burns Ford	Long Beach, Ca.
Chino Hills Ford	Chino, Ca.
Frank Coletto Ford	Harbor City, Ca.
Allen Kane Ford	No. Hollywood, Ca.
Keystone Ford	Norwalk, Ca.
Pacific Ford	Long Beach, Ca.
Tate Ford/LM	Holbrook, Az.
Beverly Hills LM	Beverly Hills, Ca.
Covey LM Sales	Phoenix, Az.
Santa Barbara LM	Santa Barbara, Ca.
Hassett LM	Wantagh, N.Y.
Knight LM	Wynnewood, Pa.
Lawrence LM	Trenton, N.J.
New Rochelle LM	New Rochelle, N.Y.
North Star LM	Poughkeepsie, N.Y.

Appendix

Sheehy LM	Springfield, Pa.
Bee Ford	Waterbury, Ct.
Best Ford, Inc.	Queens Village, N.Y.
Bridge Ford	Brooklyn, N.Y.
Dan Buckey Ford	Spring Valley, N.Y.
C & C Motors	Horsham, Pa.
Century Ford	Rockville, Md.
Champion Ford	Baltimore, Md.
Bob Doran Ford	Union, N.J.
Empire Ford	Mt. Vernon, N.Y.
Family Ford	Netcong, N.J.
Gateway Ford	Ozone Park, N.Y.
Hopkins Ford	Jenkintown, Pa.
Kuhns-Harnish Ford	Mechanicsburg, Pa.
Manhattan Ford/LM	New York, N.Y.
Manor Ford	E. Northport, N.Y.
Marple Ford	Broomall, Pa.
McCafferty Ford Sales	Langhorne, Pa.
Popular Ford	Brooklyn, N.Y.
Poughkeepsie Ford	Poughkeepsie, N.Y.
Bill Toynes Ford	Haverstraw, N.Y.
Tower Ford	Baltimore, Md.
Tristate Ford	Elkton, Md.
White Plains Ford	White Plains, N.Y.
Big Valley Ford	Stockton, Ca.
Fitzgerald Ford	Gig Harbor, Wa.
Fremont Ford Sales	Fremont, Ca.
Heritage Ford	Modesto, Ca.
Hilltop Ford Sales	Richmond, Ca.
Jim Houston Ford	Seattle, Wa.
Kingsrow Ford/LM	Hanford, Ca.
Pittsburg Ford	Pittsburg, Ca.
San Bruno Ford	San Bruno, Ca.

Appendix

Seekins Ford/LM	Fairbanks, Ak.
Central LM	Eugene, Or.
Diablo LM	Concord, Ca.
Mission LM	Layward, Ca.
San Francisco LM	San Francisco, Ca.
Shen LM	Burlingame, Ca.
Spokane LM	Spokane, Wa.
Bartow Ford Leasing	Bartow, Fl.
Action Leasing & Rental	Jackson, Ms.
Don Ford Leasing	Biloxi, Ms.
Keller Leasing & Rental	Grand Rapids, Mi.
North Bros. Ford Leasing	Troy, Mi.
Turner-Flannery Leasing	Troy, Mi.
Peyton Cramer Leasing	Redondo Beach, Ca.
Miller McVeigh Leasing	State College, Pa.
Northeast Leasing	Washington, D.C.
Illinois Auto Leasing	Libertyville, Il.
Terry's Leasing	Orland Park, Il.
American Auto Lease	Framingham, Ma.
Bob Boyd Leasing	Columbus, Oh.
Dayton Auto Lease	Kettering, Oh.
Kumfco Auto Lease	Denver, Co.
Monarch Leasing	Sunnyvale, Ca.
Redwood LM Leasing	San Francisco, Ca.

END OF DOCKET